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IN THE

# Supreme Court of the United States

OCTOBER TERM 1949.

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No. .....

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EDWIN H. PILSON, *Petitioner,*

v.

MARJORIE PILSON SALVONI.

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

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The petitioner, Edwin H. Pilson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the judgment of the United States District Court for the District of Columbia, overruling a motion of Marjorie Pilson Salvoni to revive, and extend the term of, a money judgment previously obtained by her.

## OPINIONS BELOW.

The opinion of the Circuit Court of Appeals is not yet reported.

The opinion of the District Court is reported in *81 Fed. Suppl. 654.*

## JURISDICTION.

The judgment of the Court of Appeals was entered March 20, 1950 (R. 21). The statutory provision believed to sustain the jurisdiction of this Court is Section 1254 (1), Act of June 25, 1948, C. 646, 62 Stat. 928; USCA Title 28.

## QUESTIONS PRESENTED.

1. Whether the statute of limitations is suspended as against a party, who is in fact under no disability, preventing the use of the United States Courts by such party in time of war, particularly in the light of *Birge-Forbes Co.* v. *Heye,* 251 US 317, 64 L. Ed. 286 (1920) and *Ex parte Kawato,* 317 US 69, 87 L. Ed. 58 (1942).

2. Whether the provisions of the Trading with the Enemy Act of 1917, (Act of October 6, 1917, c. 106, 40 Stat. 411, 50 USCA), prohibiting communication between residents of enemy countries and the United States during wartime vitiate proceedings in fact taken by and on behalf of a party, resident in an enemy country, in a suit pending in a United States Court during time of war.

3. Whether a party to a suit, who has acted at all times through various attorneys of record, may be heard to take diametrically opposed positions in the same suit, within a period of a few years; that is, having persuaded the court to accept one position, and then having found the result of the position thus taken to be unprofitable, may the same party in the same suit in the same court be heard to take an exactly contrary position.

## STATUTORY PROVISIONS INVOLVED.

Sec. 101, Title 15, D. C. Code (1940):

> "Every final judgment at common law and every final decree in equity for the payment of money rendered in the District Court of the United States for the District of Columbia * * * shall be good and enforce-

able, by an execution issued thereon, for the period of twelve years only from the date when an execution might first be issued thereon, or from the date of the last revival thereof under scire facias, except as provided in section 15-102; but the time during which the judgment creditor is stayed by agreement in writing filed in the cause or injunction, or other order, or by the operation of an appeal from enforcing the judgment is not to be computed as part of said period of twelve years."

Sec. 102, Title 15, D. C. Code (1940):

"At the expiration of said period of twelve years the said judgment or decree shall cease to have any operation or effect, and no action shall be brought on the same nor any scire facias or execution issued on the same thereafter; but this provision shall in no wise affect any proceeding that may be then pending for the enforcement of the said judgment or decree."

Section 107, Title 15, D. C. Code (1940):

"If during the period of twelve years from the rendition of the judgment or decree, or from judgment upon a scire facias thereon, the creditor shall cause a scire facias to be issued upon the judgment or decree and a fiat shall be issued thereupon, the effect of such fiat shall be to extend the effect and operation of said judgment or decree with the lien thereby created and all the remedies for the enforcement of the same for the period of twelve years from the date of such fiat."

Act of October 6, 1917 (Trading with the Enemy Act), c. 106, 40 Stat. 411, as amended; 50 U. S. C. A.

Treaty of Peace between the United States and Italy (61 Stat. 1369).

Rule 81 (b) Federal Rules of Civil Procedure:

"The writs of scire facias and mandamus are abolished. Relief heretofore available by mandamus or scire facias may be obtained by appropriate action or by appropriate motion under the practice prescribed in these rules."

Local Rule 30 (a):

> "A judgment may be revived against a judgment debtor on motion served with a notice of hearing by the Marshal or a person specially appointed to make service."

Section 7b of Trading with the Enemy Act of 1917: C. 106, 40 Stat. 411, 50 USCA, part of the 3rd paragraph:

> "Nothing in this Act shall be deemed to authorize the prosecution of any suit or action at law or in equity in any court within the United States by an enemy or ally of enemy prior to the end of the war, except as provided in Sec. 10 hereof." (Licenses)

Trading with the Enemy Act of 1917: C. 106, 40 Stat. 411, 50 USCA, Sec. 8, last paragraph:

> "The running of any statute of limitations shall be suspended with reference to the rights or remedies on any contract or obligation entered into prior to the beginning of the war between parties neither of whom is an enemy or ally of enemy, and containing any promise to pay or liability for payment which is evidenced by drafts or other commercial paper drawn against or secured by funds or other property situated in an enemy or ally of enemy country, and no suit shall be maintained on any such contract or obligation in any court within the United States until after the end of the war, or until the said funds or property shall be released for the payment or satisfaction of such contract or obligation: *Provided, however,* that nothing herein contained shall be construed to prevent the suspension of the running of the statute of limitations in all other cases where such suspension would occur under existing law."

## STATEMENT OF THE CASE.

### Nature of Proceeding.

This proceeding is an effort by Marjorie Pilson Salvoni, plaintiff below (hereinafter called "plaintiff"), by a motion filed September 22, 1948, to revive and extend the terms of a judgment rendered in her favor on October 13, 1934, for nine thousand one hundred and fifty dollars ($9150), which judgment expired by limitation October 13, 1946, unless limitations were in some way suspended. (R-8)

An order overruling the motion to revive and extend the judgment was entered in the District Court on February 10, 1949. (R-12, 13) From that order an appeal was taken to the United States Court of Appeals for the District of Columbia Circuit, which reversed the order of the District Court on March 20, 1950. (R-21) The judgment is final. This petition is filed to obtain a review of the decision of the Court of Appeals and for an affirmance of the order of the District Court.

The case presents the attempt of a plaintiff, domiciled in Italy since 1937 (R-9), to make use of the United States Courts, through her attorneys of record, during the late war, in an effort to collect on a judgment by execution and garnishment (R-2), and, after the close of the war, through other attorneys of record, to repudiate the action so taken in her behalf and to revive her judgment upon the theory that during the war she was excluded from the United States Courts (R-8, 9).

The judgment was entered on October 13, 1934 (R-1); the plaintiff removed to Italy in 1937 (R-9); war began between the United States and Italy December 11, 1941. From December 1942 to February 1945 (R-13, 14), efforts were made in the District Court upon behalf of the plaintiff, and in the plaintiff's name, to collect the judgment by execution and garnishment, over the objection of the petitioner (hereinafter called "defendant") that plaintiff had

no right to the use of the United States Courts by reason of her residence in Italy, which residence was alleged as a matter of fact, together with the impossibility of plaintiff communicating with her lawyers at that time (R-3, 4, 5). On October 13, 1946, the judgment expired by limitation, unless limitations were in some way suspended. On September 15, 1947, a treaty of peace with Italy became operative. On September 22, 1948, the motion to revive and extend the judgment was filed on behalf of plaintiff by attorneys then appearing for her for the first time. (R-8). This motion was denied by the District Court. (R-12). The Court of Appeals decided such denial was erroneous and ordered its reversal. (R-21).

This action of the Court of Appeals leaves the judgment of October 13, 1934, in force and the defendant's property subject to the writ of execution and other processes for collection.

The memorandum opinion of the District Court (R-10, 12) referred to plaintiff's contention, made in support of her 1948 motion to revive and extend the judgment, that, by her residence in Italy and the terms of the Trading with the Enemy Act, she was precluded from prosecuting her suit during the period of the war and that her residence in Italy also tolled the statute of limitations and extended the time within which a motion to revive the judgment might be made. The Court then noted that such contention was diametrically opposed to the position taken in her name and in her behalf, when, in March 1943, defendant objected to plaintiff's motion for an oral examination of a certain garnishee. The Court noted that defendant had then insisted plaintiff was then living in Italy, at that time an enemy country, that the motion had been filed without authority of the plaintiff and did not represent her action, since "postal communication" between Italy and the United States was not maintained. The District Court further noted that in spite of those contentions of the defendant the plaintiff prevailed upon the District Court in

1943 to grant her motion for an oral examination of the garnishee and to allow her to proceed with the attempt to collect the amount of the judgment. Accordingly, the District Court held in 1949, that the plaintiff had, in 1943, presented a factual and legal question for decision. That question was determined in her favor in 1943, namely that she then had a right to proceed, notwithstanding the provisions of the Trading with the Enemy Act. That Act did not by its terms preclude the action which the plaintiff then took. The District Court in 1949 further pointed out that there was, in March 1943, no obstacle to her seeking to extend the life of the judgment within the period fixed by law. The District Court in 1949 considered itself bound by the 1943 determination of the law of the case made at the instance of the plaintiff, and denied the motion made in 1948 to revive and extend the judgment.

In reversing the District Court decision, the Court of Appeals decided (R-16, 20) that the statute of limitations was tolled during the war for two reasons, (1) we are not to send treasure abroad to destroy us, (2) war imports a prohibition to our citizens against all correspondence with citizens domiciled in the enemy country. The Court conceded that the first reason did not apply in this case because the Alien Property Custodian had participated herein in 1943, but it held that the second was decisive, (notwithstanding the partial access to the Court permitted to plaintiff through her counsel in the unfruitful garnishment proceedings) because of the prohibition in the Trading with the Enemy Act prohibiting persons resident in Italy from communicating with anyone in this country except in the regular course of mail, and the court took notice of the absence of a regular course of mail between the two countries at war. An additional ground assigned in support of its decision by the Court of Appeals is that the 1943 decision need not bind the Court in 1949 because the 1943 ruling dealt with the plaintiff's capacity to bring action for garnishment and attachment, whereas the 1949 ruling was

made upon the question of whether or not the 1943 proceedings tolled the statute of limitations. No authorities are cited by the Court in support of this ground for its decision.

As originally filed on March 20, 1950, the opinion of the Court of Appeals included a paragraph (R-20) to the effect that even if the proceedings initiated in 1942 removed the case from the full application of the rule, by rebutting the theory of lack of access to the court, nevertheless, the suspension of the statute began in any event as soon as such actual access terminated. The court further said that the barriers of war closed down on February 16, 1945, the last date of any action in court taken during the war; the war continued until September 15, 1947, two years and seven months thereafter; the statute is said to have been tolled for that length of time, which length of time added to the date of the usual expiration of the judgment would give the plaintiff until May, 1949, to move to extend the judgment.

By an order entered May 5, 1950, that paragraph was deleted and a new paragraph substituted to the following effect (R-20): In this case the war period should be limited to the period December 11, 1941 to October 2, 1945, the date on which restrictions on business communication between the United States and Italy were removed; accordingly the statute was extended for the period of three years, nine months and twenty-one days, within which time the motion to revive and extend was filed.

The above amendment was made after this petition and argument were prepared but before they were printed. The petitioner had included in his argument a section contending that the court of Appeals had no right to take judicial notice of the absence of regular mail communication and ignore the termination of hostilities and the resumption of communications. The Court of Appeals has now made that section of the argument unnecessary by noting that communication remained under no restrictions after October 2, 1945.

It is the contention of this petitioner that the judgment expired in any event, by limitations, on October 13, 1946, because the plaintiff was never in fact under any disability preventing her use of the United States courts, and because she did use them through her attorneys of record.

## REASONS FOR GRANTING PETITION.

A. The decision of the Circuit Court below that the statute of limitations is suspended as against a party, who, notwithstanding the statute, actually made use of the United States Courts in time of war, is erroneous.

B. The decision of the Circuit Court below that the provisions of the Trading with the Enemy Act vitiate judicial proceedings in fact taken by and on behalf of a party, resident in an enemy country, in a proceeding in a United States Court in time of war is erroneous.

C. The decision of the Circuit Court below, with respect to A and B above, is directly contrary to two decisions of this Court, *Birge-Forbes Co.* v. *Heye,* 251 US 317, 64 L. Ed. 286 (1920) and *Ex parte Kawato,* 317 US 69, 87 L. Ed. 58, (1942), both of which directly support the ruling of the District Court in 1943, allowing plaintiff to proceed at that time with her attempt to collect her judgment.

D. The decision of the Circuit Court below that a party may take diametrically opposite positions in the same litigation between the same parties in the same court is erroneous, and is contra to the rule laid down by this Court in *Davis* v. *Wakelee,* 156 US 680, 39 L. Ed. 578, (1895).

E. The interpretation of the Trading with the Enemy Act is a matter of public interest at this time.

F. The case has been decided contrary to general law.

## ARGUMENT.

### Summary.

1. The Statute of limitations is not suspended as against a party, who, notwithstanding the statute, actually made use of the United States courts in time of war. *Birge-Forbes Co.* v. *Heye,* 251 US 317, 64 L. Ed. 286 (1920); *Ex parte Kawato,* 317 US 69, 87 L. Ed. 58 (1942).

2. The provisions of the Trading With The Enemy Act prohibiting communication between residents of enemy countries and the United States in time of war do not vitiate proceedings which were in fact taken by and on behalf of a party, resident in an enemy country, in a suit pending in a United States court in time of war.

3. A party, who has acted at all times through various attorneys of record, may not be heard to take diametrically opposite positions in the same court and in the same suit, where he has persuaded the court to accept his first position, there has been no appeal, and the change is made merely because the party's interests have changed.

### Questions Presented.

-1-

**Whether the statute of limitations is suspended as against a party who is under no disability in fact preventing the use of the United States courts by such party in war time, particularly in the light of Birge-Forbes Co. v. Heye 251 U. S. 317, 64 L. Ed. 286 (1920) and Ex parte Kawato, 317 U. S. 69, 87 L. Ed. 58 (1942).**

The defendant contends that the statute of limitations is not suspended as against such a party and that the decision holding otherwise is directly contrary to the two cases above mentioned.

Neither the common law nor the Trading with the Enemy Act precluded the plaintiff from using the courts in 1943

if in fact she was able to do so, and for this purpose she and her attorneys are the same. The District Court in its opinion overruling plaintiff's motion to revive and extend the judgment held that the Trading with the Enemy Act did not preclude the action which the plaintiff took in 1942 to 1945, and that the decision of the District Court in 1943, made at the plaintiff's instance, was that the common law did not preclude her in the circumstances of this case. (R-11) The provisions, saving in nature, of the Trading with the Enemy Act are for the benefit of non-resident enemy aliens who cannot in fact use the courts of the United States, rather than for those already supplied with all the means and facilities actually to use them.

The basis of the rule suspending the statute is a matter of common justice. A litigant deprived of the right to sue because of a temporary disability should not be held to have lost that right simply by reason of the passage of time during the disability. It follows that if, as a matter of fact or law, the plaintiff was not deprived of the right to use the United States Courts there can be no reason to apply the rule.

It is claimed by the plaintiff, and, at least impliedly, held by the Court of Appeals, that the District Court had no power in 1943 to render a decision permitting the plaintiff to proceed, in the face of the fact that she was a resident of Italy, (although an American citizen) which country was then at war with the United States. In order to find such lack of power, there must be discovered in the statutes or cases, a command or authority depriving the District Court of the power to act in 1942 or 1943. But neither the Trading with the Enemy Act nor the law of nations discloses such command or authority. On the contrary, examination of the statute and decisions shows, first, that the Trading with the Enemy Act contains no direction that the court shall have no jurisdiction, and second, that the adjudicated cases likewise contain no such prohibition.

A court which has jurisdiction has a right to decide every question occurring in the case. 14 Am. Jur. 370.

The Trading with the Enemy Act says that nothing in its provisions shall authorize an enemy to proceed in our courts. This is a different thing from saying that the Court has no power to determine whether, under other authorities, an enemy may or may not proceed. *Chemacid* v. *Ferrotar Corp.*, 51 Fed. Supp. 756 (1943). The decided cases do not state that the court has no jurisdiction to determine whether or not an enemy may sue, though they state that where the enemy falls within a certain defined class, he cannot proceed. In some cases it has been held that for reasons of public policy an enemy may not proceed. There is no question that the court in each instance had the jurisdiction to make this determination. In cases, heretofore cited, the courts have determined that an enemy may proceed, and there can be no question that the courts likewise had the jurisdiction, or the power, to decide that point.

Thus the conclusion is that the matter was within the power of the District Court to determine in 1943, based on the factual situation before it, and if by reason of the situation of the parties, the court believed that the national interest would not suffer and that justice would be promoted by permitting the enemy plaintiff to proceed, the District Court in 1943 was justified in permitting such action. The principal ground upon which the determination has been made in all cases of this type is whether or not, by proceeding, aid and comfort will be given to the enemy. If the answer is in the affirmative, the courts have denied the right to proceed, but if the answer is in the negative, the enemy has been permitted to continue his action.

The decision of the Circuit Court in the case at bar holds in effect that the plaintiff herein had no right to proceed in 1943, despite the considerations discussed above. In addi-

tion, the view expressed by the Circuit Court is *contra* to the clearly stated views of this Court shown in the following two cases.

*Birge-Forbes Co.* v. *Heye,* 251 US 317, 64 L. Ed. 286 (1920) was a suit by a Bremen cotton broker against Texas exporters because the plaintiff broker had paid certain sums under the rule of the Bremen cotton exchange occasioned by defective cotton furnished by the defendant exporter. Plaintiff recovered a verdict in the District Court and the defendant carried the case to the Circuit Court of Appeals. In the meantime plaintiff had become an alien enemy, and defendant moved to dismiss or suspend the suit on that ground. The Court of Appeals affirmed the judgment with the modification that it should be paid to the Clerk of the trial court and by him turned over to the Alien Property Custodian. In affirming, this Court said, at 64 L. Ed. 289:

> "Upon the last-mentioned question, although it seemed proper that it should be set at rest, we can feel no doubt. The plaintiff had got his judgment before war was declared, and the defendant, the petitioner, had delayed the collection of it by taking the case up. Such a case was disposed of without discussion by Chief Justice Marshall, speaking for the court in *Owens* v. *Hanney,* 9 Cranch, 180, 3 L. Ed. 697; *Kershar* v. *Kelsey,* 100 Mass. 561, 564, 97 Am. Dec. 124, 1 Am. Rep. 142. There is nothing 'mysteriously noxious' (*Coolidge* v. *Inglee,* 13 Mass. 26, 37) in a judgment for an alien enemy. Objection to it in these days goes only so far as it would give aid and comfort to the other side. *Hanger* v. *Abbott,* 6 Wall. 532, 536, 18 L. Ed. 939, 941; *M'Connell* v. *Hector,* 3 Bos. & P, 113, 114, 127 Eng. Reprint, 61, 6 Revised Rep. 724. Such aid and comfort were prevented by the provisions that the sum recovered should be paid over to the Alien Property Custodian, and the judgment in this respect was correct."

The parallel between the case of 1920 and the present one is striking, even to the point that in each instance the plain-

tiff had obtained a judgment before the declaration of war. In the earlier case the court provided that the funds recovered should go to the Alien Property Custodian; in the present case the Alien Property Custodian's attorneys were in the case for that very purpose (R-13) and if plaintiff had been successful in collecting against the defendant, the Alien Property Custodian would have impounded the fruits of that collection. The 1920 case is cited by the Court of Appeals in its opinion but it is certainly not followed. There is no evidence indicated in the reports of the 1920 case to show that the Bremen cotton broker was in communication with his lawyers in the U. S. after the outbreak of the war and after the appeal by the Texas defendant to the Circuit Court of Appeals. The Circuit Court of Appeals in an action, approved by this Court on appeal, allowed the enemy alien plaintiff to go forward with the litigation, and Chief Judge Eicher of the District Court, did precisely the same thing in the present case in 1943.

*The Birge-Forbes* case is cited with approval by this Court in *Ex parte Kawato*, 317 US 69, 87 L. Ed. 58 (1942). This was a suit by an alien, a citizen of Japan, who had lived in the United States since 1905, to recover for wages due him as a seaman and for damages. The District Court granted a motion to abate the action, and the Circuit Court of Appeals affirmed without opinion. The Federal Supreme Court reversed, tracing the development of the law on the rights of enemy aliens in war time since early days in England and pointing out that the defendant by the motion to abate seeks to stand in the position of the government, and that the purpose of the modern rule on this subject is to prevent property being taken over and used by the enemy nation against the United States. In this particular case the enemy alien was resident in the United States, but the court states in its unanimous opinion at 317 US 74, 87 L. Ed. 62:

> "Even if petitioner were a non-resident enemy alien, it might be more appropriate to release the amount of

> his claim to the Alien Property Custodian rather than to the claimants; and this is precisely what was done in *Birge-Forbes Co.* v. *Heye,* 251 US 317, 323 64 L. Ed. 286, 289. . . . in which this court said that the sole objection to giving judgment for an alien enemy . . . 'goes only so far as it would give aid and comfort to the other side.' "

It is thus seen that the Court of Appeals has decided the present case directly contrary to the holding of this Court on the same subject in 1920, which holding was cited by this Court with approval in 1942. The Court of Appeals reversed Judge Morris' 1949 action in refusing to revive and extend the judgment because Judge Morris had followed Chief Judge Eicher's 1943 ruling. But Chief Judge Eicher in 1943 had merely followed the lead of this Court in *Birge-Forbes* v. *Heye,* supra, as this Court itself had done in 1942 when it cited *Birge-Forbes* v. *Heye* with every indication of approval.

It is submitted that this is, in and of itself alone, a sufficient reason for granting the writ of certiorari herein.

-2-

**Whether the provisions of the Trading with the Enemy Act prohibiting communication between residents of enemy countries and the United States during war time vitiate proceedings in fact taken by and on behalf of a party, resident in an enemy country, in a suit pending in a United States Court in time of war.**

The defendant contends that the provisions referred to do not vitiate proceedings in fact taken by and on behalf of a non-resident enemy in a suit pending in a United States Court in time of war.

As heretofore set out in this brief, this plaintiff is not within the class the Trading with the Enemy Act was designed to protect, that is, those residents of enemy alien countries who were without access to the United States courts. This plaintiff needed no access for she was already

there in court through her attorneys of record. Moresoever, the question of her right to be there, as a matter of fact and law was raised by the defendant at the time the action was taken in plaintiff's behalf in 1942 and 1943, and decided by the court in plaintiff's favor. (R-3, 6) The Trading with the Enemy Act was cited by the defendant in 1943 as one of the reasons why plaintiff should not be allowed to proceed at that time. (R-3) Thus the law of the case was settled by the District Court, at the instance of the plaintiff, that the suit could be maintained by the plaintiff, notwithstanding the pendency of war and the provisions of the Trading with the Enemy Act. Moreover, the representatives of the Alien Property Custodian were in the case for the protection of the rights of the government and to prevent the possibility that the enemy might derive any aid or comfort from the collection of the judgment, if such collection should be made. (R-13)

Under the law and authorities, especially *Birge-Forbes* v. *Heye, supra* and *ex parte Kawato, supra,* the District Court through Chief Judge Eicher in 1943 was justified in its holding that plaintiff might proceed.

The only possible avoidance of the logic of the foregoing is the apparently new principle discovered by the Court of Appeals that the plaintiff had merely "partial access" (R-19) to the Court. In a paragraph later deleted from this opinion the court refers to "actual access". (R-20) But, says the Court, she lacks sufficient "access" to make it incumbent upon her to protect her rights by a motion of a routine character to extend the term of her judgment. No authorities are cited by the Court of Appeals for the theory of "partial access" (R-19, top) or "actual access" (R-20) and it is submitted that none can be found. A person is either in court or he is not in court. Special appearances, to protect a jurisdictional position, are of course common. But no special appearance was made in 1942 by plaintiff's attorneys, nor is any claim of such special appearance made herein. The Circuit Court below in the face of the record could not say this plaintiff was not in

court, and if it were admitted that she was in court, then she was chargeable with a duty to protect herself against limitations, and the decision of the Court of Appeals could not stand. The new theory of "partial access", as produced, is all that could justify a reversal of Judge Morris' decision. See, however, *In re Petition of Jacobs*, 116 Vt. 11, 13 (adv. sheets) in which the Court said: "(The defendant) might waive its privileges but it could not evade its obligations founded on its appearance."

If the plaintiff had succeeded, through her attorneys, between 1942 and February 1945 in collecting the amount of the judgment and the same had been held for her by the Alien Property Custodian, is it to be supposed that after plaintiff had acquired what might be called "complete access" after October 2, 1945, she would have requested the court to vacate the collection of the judgment and return the money to the defendant? The question of course answers itself. The Court of Appeals has simply undertaken to find a way for a party to have all the benefits of presence in court but none of the burdens of presence there. It would be exactly as logical to say that a defendant might answer a complaint, file a counter suit, contest a trial, through his attorneys, and lose, and then be allowed to claim excuse from being subjected to the judgment upon the ground that his appearance was merely special and the court should not have believed he was ever in its presence at all.

It cannot too strongly be emphasized that the earlier decision by Chief Judge Eicher that the suit could be maintained by the plaintiff, notwithstanding the pendency of war, was procured in the name of and on behalf of the plaintiff. (R-2) The later exactly contrary position taken by the plaintiff that the pendency of war was a complete bar to her former proceeding was in the same court in the same suit. (R-8) The first decision settled the law of the case. The mere fact that the plaintiff's later contradictory position was taken in a proceeding, involving a different incident, namely limitations, is of no consequence as a legal matter.

There is no intention evident in the Trading with the Enemy Act that even non-resident enemy aliens should have all the benefits of being before a U. S. court and be charged with none of the burdens of litigation.

-3-

**Whether a party to a suit, who has acted at all times through various attorneys of record, may be heard to take diametrically opposed positions in the same suit, within a period of a few years; that is, having persuaded the court to accept one position, and then having found the result of the position thus taken to be unprofitable, may the same party in the same suit in the same court be heard to take an exactly contrary position.**

The defendant contends that under all the authorities, including decisions of this court, the plaintiff may not be heard in 1948 to take a position exactly contrary to that taken in her behalf in 1943.

In 1943 the plaintiff, through attorneys A and B, her then attorneys of record, caused the issuance of a writ of garnishment and moved for oral examination of a certain garnishee. (R-2) The defendant objected to the motion upon the precise ground that the plaintiff was then a resident of Italy which was at war with the United States and that the payment of money by the garnishee was prohibited by the Trading With the Enemy Act. Defendant also filed two affidavits, alleging as facts the plaintiff's residence in Italy, that she had not been able to communicate with persons in the U. S. since the declaration of war and that she had not authorized any attorney to present the motion, which was filed without her authority. (R-3, 4, 5). The plaintiff's motion was granted, no appeal was taken by defendant, and proceedings went forward accordingly, with no collection resulting for the plaintiff. (R-6, 7).

In 1948 the plaintiff, through attorney C, moved to revive and extend the judgment which in ordinary course had ex-

pired in 1946, giving as a ground for such motion her inability to proceed earlier because of the existence of war between the U. S. and Italy from December 11, 1941, to September 15, 1947, with an alleged consequential suspending of the judgment between the named dates, and filing therewith an affidavit the only material allegations of which allege her presence in Italy since August 1937 and her claim to American citizenship. (R-8, 9).

Thus in 1948 we find the plaintiff urging the precise opposite of the position she had successfully maintained in 1943.

The rule on this subject is thus stated by this Court in *Davis* v. *Wakelee,* 156 US 680, 689, 39 L. Ed. 578, 584 (1895):

> ". . . Where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

*Davis* v. *Wakelee* was cited and followed in *Howard* v. *State,* 115 Ga. 244, 41 SE 658 (1902) in which it was held that the accused cannot complain of instructions handed to the court by counsel for the defense and given at his request, and in *Davis* v. *Cornwall,* 68 Fed. 522 (1895), wherein it was held that a party cannot maintain the validity of a judgment for one purpose and deny it for another.

The lower Circuit Court has itself cited and accepted the rule of *Davis* v. *Wakelee, supra,* although the facts in the case then before it showed that the rule did not apply because, unlike the present situation, the inconsistent positions were taken in proceedings in which the parties were not the same in both instances. See *Galt* v. *Phoenix Indemnity Co.,* 74 App. D. C. 156 (1941).

Moreover, as late as May 1, 1950, the Circuit Court below recognized and applied the principle requiring consistency on the part of positions taken by the same party in legal

proceedings. *Ramsey* v. *Curtis,* U. S. Court of Appeals for the District of Columbia Circuit, No. 10, 219, not yet reported, was a case in which a party interested in a decedent's estate stood by without protest while the executor brought suit to set aside a certain deed of the testator; and, the suit having been lost, the same party excepted to the expenses of the litigation, concerning the deed, claimed in the executor's account. The District Court sustained the exceptions but the Court of Appeals reversed on the ground that there must be consistency in judicial proceedings, stating that the requirement of such consistency is sometimes regarded as a form of equitable estoppel, adding (p. 7)

> "We regard it as inequitable to deny reimbursement at the tardy suggestion of incapacity to sue, when the expense would have been avoided had the suggestion been seasonably made."

Thus we have here a conflict of decisions within the Circuit on this point between *Salvoni* v. *Pilson,* decided March 20, and *Ramsey* v. *Curtis,* decided May 1 of the same year.

Numerous cases might be cited in support of the rule announced in *Davis* v. *Wakelee, supra.* The two which follow are typical.

*Thwing* v. *McDonald,* 134 Minn. 148, 156 NW 780, 158 NW 820; 159 NW 564, Ann. Cas. 1918-E. 420 (1916) was a suit to enjoin a particular defendant from managing funds of a corporation, to remove him as officer and director, and to dissolve the corporation. All relief asked for was granted in the lower court, and action was affirmed as to all except dissolution. During this litigation the following occurred, as stated by the Court at Ann. Cas. 1918-E. p. 421, and the following ruling was made:

> "At the outset appellant, relying upon Bell v. Jarvis, 98 Minn. 109, 107 N. W. 547, 8 Ann. Cas. 938, insists that the court had no jurisdiction to try the case at the time and place where it was tried. The case was

regularly brought on for trial at the general March, 1915, term of court in Itasca county, but was not reached until June 25. At that time appellant applied for a continuance until the September term. Plaintiff opposed it. The court made an order postponing the trial to July 20 at its summer chambers at Glengarry in Cass county, and provided therein that appellant might secure a continuance until the September term by complying with certain prescribed conditions on or before July 15. Appellant failed to comply with such conditions, and the case was tried at Glengarry as provided in the order. At the opening of the trial appellant raised the point that the court had no authority to try it elsewhere than at the county seat. He is not in position to question the power of the court to try it at the place fixed in the order. The granting of any continuance was within the discretion of the court. After stating orally that the showing made did not warrant the continuance asked, the court made the order in the terms stated. It was made solely for the benefit of appellant. He acquiesced in it when it was made, took the benefit of it, and cannot now be heard to attack its validity."

*Cambron* v. *State,* 191 Ind. 431, 133 NE 498, 19 ALR 623 (1922) was a prosecution for burglary. The defendant moved to quash an affidavit of complaint; the motion was granted and an amended affidavit was filed. The Court said, on this point at 19 A. L. R. 625:

> "Neither could appellant (defendant) reserve an available exception to an order sustaining a motion made by himself, which he had not withdrawn or attempted to withdraw."

At a later point in the opinion the Court says, 19 A. L. R. 626:

> "No rule of law is more fully established than that a party cannot successfully complain on appeal of an error which he procured the trial court to commit, *and that filing a motion will estop a party to challenge a ruling sustaining such motion,* where it is not dismissed or withdrawn. . . . Therefore appellant is

> estopped to deny that the first affidavit was improperly quashed. And having procured that ruling to be made, by filing his motion asking the court to quash the affidavit, he was thereby put in the same situation as if the first affidavit had never been filed." (Italics supplied)

This plaintiff through her then attorneys in 1942 and 1943 claimed, and persuaded the District Court to grant, the right to proceed with attempts by drastic writs to collect her judgment in the face of opposition furnished by the defendant on the ground that she was precluded by war from proceeding. (R-2, 3, 4). In 1948 through other attorneys, the plaintiff urges the exact opposite of her earlier position, insisting that the existence of the state of war and her residence in Italy precluded her from prosecuting the action and tolled the statute of limitations. (R-8, 10). In the plaintiff's brief in the Court of Appeals reference is made to "attorneys apparently acting for" plaintiff in 1942 to 1945, and the claim is advanced that, since the statute of limitations was allegedly suspended during the war, allowing her to proceed was error, and the ruling on that point was not binding on other judges of the same court.

The whole difficulty with the plaintiff's position in this case is that she seeks to avoid the inevitable consequence of her own deliberate action, taken by those who were clothed with all possible *indicia* of her authority. Through her attorneys—and they claimed no standing in court except in her name and for her—she convinced the District Court of her right to proceed. Her right to proceed of course included the right to extend her judgment. Plaintiff either had a right in court or she did not, and if she did have such right and obtained benefits thereby in the shape of jury trial to determine whether she might collect money from a particular garnishee, then by the same token she is chargeable with protecting her judgment from lapsing by passage of time; and this was a matter merely of making a routine

motion. Plaintiff, equipped at all times with these same attorneys, up into the year 1945, failed to exercise that right.

The defendant took no appeal from the decision of Chief Judge Eicher that the plaintiff had a right to proceed. Judge Morris said in his memorandum opinion. (R-11, foot)

> "No appeal was taken and under the law of the case as so fixed and determined, there was no obstacle to her seeking to extend the life of the judgment within the twelve year period of limitations fixed by the statute."

By a complete reversal of position the plaintiff seeks to escape the result of her own delay or the delay of attorneys who, for this purpose, are the same as herself. In effect she has successfully claimed that through her attorneys she hoodwinked the District Court into permitting her to take action which she now says she should not have been allowed to take. It is very like the situation of a person who, confronted with exposure of a fraud and his own statement, says, "You should not have believed me."

Judge Morris' opinion says, (R-11)

> "To say now that she was precluded from taking action in this case because of her residence in Italy during the period of a state of war is to say that her protracted actions above referred to, in seeking to enforce the judgment in her favor, was trifling with the Court."

The Court of Appeals endeavors to escape from the devastating effect of this situation by saying that as a fact she did not do these things in 1942 and 1943 because she could not authorize it. But that very claim was made by the defendant in 1943 and overruled, as a matter of fact, by the Chief Judge then dealing with the case. The Court of Appeals states there is no evidence that she instructed her attorneys to proceed (R-19); it may as well be said that

there is no evidence that she did not do so, and the burden is certainly upon the plaintiff to explain, affirmatively rather than negatively, this complete reversal of position. No explanation, no excuse is offered. Consequently the only possible escape is to say that the defendant, upon whom the burden of proof does not rest, has not shown that she did tell her attorneys to collect the judgment. Further comment on this point seems unnecessary.

In the argument in the Court of Appeals plaintiff's attorney contended that estoppel did not operate against his client by reason of the inconsistency of her two positions, because allegedly, the defendant had suffered no injury. It is not admitted that defendant has suffered no injury. He had a right to rely upon the decision of 1943 that the plaintiff was then rightly in court for all purposes, and upon the expiration of the judgment in 1946 with consequential freedom from attachments. However, the rule is that while elements of reliance and injury, although often considered, do not enter into such so-called estoppel in legal proceedings as they do in estoppel proper, nevertheless, the principle requiring consistency in judicial proceedings is customarily considered a form of equitable estoppel, 19 Am. Jur. 706, *Ramsey* v. *Curtis,* U. S. Circuit Court of Appeals, D. C., May 1, 1950. This is said to be based on manifest justice and to a greater or less degree on consideration of orderliness, regularity and expedition in litigation.

## CONCLUSION.

The decision of the Court of Appeals is erroneous in that

(1) It holds that the statute of limitations is suspended as against a party, who notwithstanding the statute, actually made use of the United States Courts in time of war;

(2) It holds that the Trading with the Enemy Act, prohibiting communication between residents of enemy countries and the United States, in war time, vitiates proceedings actually taken by and on behalf of a resident in an enemy country in a suit pending in a United States Court

in time of war; and the decision of the Court below is contra to two decisions of this Court: *Birge-Forbes Co.* v. *Heye,* 251 US 317, 64 L. Ed. 286 (1920) and *Ex parte Kawato,* 317 US 69, 87 L. Ed. 58 (1942);

(3) It is contrary to the rule preventing the same party taking diametrically opposite positions in the same litigation in the same court, merely for his own advantage.

Accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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